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No. -

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California;

2. Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California; and

3. Advanced Lightweight Concrete Co., Inc.

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Petition for a Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

The Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California (hereinafter "Laborers Trust Funds" or "Trust Funds") and the Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California (hereinafter "Cement Masons Trust Funds" or "Trust Funds") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 26, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 779 F.2d 497. That Court's order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Appendix C, *infra*) was filed on March 18, 1986. The order of the United States District Court for the Northern District of California (Appendix B, *infra*) was filed on July 30, 1984, and entered on July 31, 1984, and is not reported.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 26, 1985. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on January 9, 1986. On March 18, 1986, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is timely filed with this Court under 28 U.S.C. §2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Sections 7 and 8, 29 U.S.C. §§157 and 158.

B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§ 185, 186 and 187.

C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§ 1132, 1145, 1381, 1383, 1392, 1401 and 1451.

D. Multiemployer Pension Plan Amendments Act of 1980, Sections 3, 306 and 104(2), 29 U.S.C. §§ 1001a, 1132(b)(2), 1132(g)(2), 1145 and 1381–1452.

Pertinent portions of these statutory provisions are reproduced at Appendix D, *infra*.

STATEMENT OF THE CASE

The Laborers Trust Funds and the Cement Masons Trust Funds are multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §§ 1001–1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208. The Laborers Trust Funds were created by a collective bargaining agreement and trust agreements between the Northern California District Council of Laborers (hereinafter "Laborers Union") and various multiemployer associations representing construction industry employers in collective bargaining with the Laborers Union. The Cement Masons Trust Funds were similarly created by the District Council of Plasterers and Cement Masons of Northern California (hereinafter "Cement Masons Union") and various multiemployer associations.

Advanced Lightweight Concrete Co., Inc. (hereinafter "Advanced Lightweight") was a signatory employer to the 1980–1983 Laborers' Master Agreement and to the 1980–1983 Cement Masons Master Agreement. The Laborers' Master Agreement and the Cement Masons Master Agreement incorporated by reference the Laborers Trust Agreements and the Cement Masons Trust Agreements respectively. The Laborers' Master Agreement and the Laborers Trust Agreements required Advanced Lightweight to make

monthly contributions to the Laborers Trust Funds on behalf of employees covered by the Laborers' Master Agreement and to submit to an audit of its books and records upon request of the Laborers Trust Funds. The Cement Masons Master Agreement and the Cement Masons Trust Agreements contained similar requirements. Advanced Lightweight remained bound to the 1980–1983 Laborers' Master Agreement and to the 1980–1983 Cement Masons Master Agreement during the express term of each of those agreements.

In a letter dated April 1, 1983, Advanced Lightweight advised the Laborers Union that Advanced Lightweight would not be bound by the Laborers' Master Agreement after June 15, 1983. In that same letter, Advanced Lightweight stated that it stood "ready and willing to meet with you as an individual employer for the purpose of collective bargaining with respect to any of our employees whom you are entitled to represent." Collective bargaining negotiations occurred between the Laborers Union and Advanced Lightweight after April 1, 1983. No impasse was reached in these negotiations prior to June 15, 1983. The relevant facts with respect to the Cement Masons Union are similar.

Despite the fact that no impasse had been reached in the negotiations with either the Laborers Union or the Cement Masons Union, Advanced Lightweight ceased making fringe benefit contributions to the Laborers Trust Funds and the Cement Masons Trust Funds after June 15, 1983. Advanced Lightweight also refused to permit an audit of its books and records which had been requested by the Laborers Trust Funds and the Cement Masons Trust Funds for the period after June 15, 1983. The Laborers Trust Funds and the Cement Masons Trust Funds filed suit in United States District Court to recover the unpaid fringe benefit contributions due and owing for the period June 16, 1983, to September 30, 1983, based on an estimated liability, and to compel Advanced Lightweight to submit to an audit of its books and records for the period January 1, 1983, to the present and to pay all contributions found to be due and owing. The Trust Funds contend that the basis for federal jurisdiction in the District Court is found in Sections 502 and 515 of ERISA, as amended, 29 U.S.C. §§ 1132 and 1145.

The question presented for review in this petition—whether or not a United States District Court has jurisdiction pursuant to Sections 502 and 515 of ERISA, as amended, 29 U.S.C. § 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions—was the central issue in the courts below. The District Court granted Advanced Lightweight's motion for summary judgment and issued an order consisting of one sentence.

The Ninth Circuit held that the primary jurisdiction of the National Labor Relations Board (hereinafter "NLRB") preempts a trust fund's suit in district court under Sections 502 and 515 of ERISA, as amended, 29 U.S.C. §§ 1132 and 1145, to recover delinquent fringe benefit contributions accrued after a collective bargaining agreement has expired. 779 F.2d at 498. The decision below reiterated the rule that, following expiration of a collective bargaining agreement and during the period that an employer has a duty to bargain in good faith with the union that represents its employees, the employer is obligated to continue making fringe benefit contributions pursuant to the terms of the expired collective bargaining agreement, until the employer negotiates in good faith with the union and reaches either a new collective bargaining agreement or an impasse. Failure to make such contributions is an unfair labor practice in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 158(d). *See NLRB v. Southwest Security Equipment Corporation*, 736 F.2d 1332, 1337 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1854 (1985); *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *Producers Dairy Delivery Co., Inc. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970). *See also NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Ninth Circuit emphasized that there was no bar to the Trust Funds' filing an unfair labor practice charge against Advanced Lightweight. 779 F.2d at 503.

Because the Ninth Circuit found "no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse" (*id*. at 505), the Ninth Circuit decided the matter by the application of what it termed an "accepted labor law principle": "When presented with a dispute that involves adjudicating conduct which 'is arguably within the compass of § 7 or § 8 of the NLRA,' a federal court must defer to the primary jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)." *Id*. at 504. The Ninth Circuit reasoned as follows:

> . . . . Advanced's failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice. While admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination. Without a section 8(a)(5) violation, there is no section 515 infraction. Making this underlying labor law determination is exclusively an NLRB matter. [Footnote omitted.]

Id. The Ninth Circuit accordingly affirmed the District Court's grant of summary judgment to Advanced Lightweight. *Id*. at 505.[1]

REASONS FOR GRANTING THE WRIT

At issue in the instant case is a tension between rights and obligations under ERISA, as amended by the MPPAA, and under the NLRA. The Ninth Circuit resolved this tension in a manner that conflicts with decisions of this Court, deprives trustees of multiemployer employee benefit plans of remedies expressly provided by Congress to discourage contribution delinquencies, and requires such trustees to delegate their fiduciary duties (which the Court

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[1]The Third and Fifth Circuits and another panel of the Ninth Circuit have all recently reached the same result in similar cases. *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office*, 783 F.2d 919 (9th Cir. 1986). The Fifth and Ninth Circuits cited the decision below.

found so important in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. ___, 86 L.Ed.2d 447 (1985)) to collect delinquent contributions to the NLRB.[2] Plenary consideration of the matter by this Court is essential.

The question presented for review in this petition is of profound significance to the thousands of multiemployer employee benefit plans covered by ERISA and to the millions of employees and their dependents who are the beneficiaries of these plans. After the expiration of a collective bargaining agreement, employees commonly continue to work during the negotiations for a new agreement. Not infrequently, these negotiations may continue for months or even years. While the employer continues to adhere to the terms of the expired agreement, the multiemployer employee benefit plans continue to accept the contributions and to provide the benefits in precisely the same manner as they would under an extant agreement. But when the employer ceases making fringe benefit contributions, and the employees face the loss of vital benefits, the consequences to the financial integrity of the plans and the welfare of their beneficiaries can be severe. A readily available, certain, meaningful federal court remedy in such cases is not only envisioned by the comprehensive statutory scheme, language, legislative history and policies of ERISA, as amended by the MPPAA, but also absolutely necessary if the trustees, in the discharge of their fiduciary duties to assure the financial integrity of multiemployer employee benefit plans, are to have an effective avenue of redress.

I. The Policies, Language, Legislative History and Comprehensive Statutory Scheme of ERISA, as Amended by MPPAA, Indicate that Section 515 Encompasses Suits by Multiemployer Employee Benefit Plans To Collect Post-Contract Expiration Contribution Delinquencies.

Each of the Trust Funds was created by a written trust agreement pursuant to Section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5). Although Section 302 generally prohibits an employer from making

[2]The Trust Funds respectfully urge the Court to invite the filing of a brief by the United States to aid the Court in its consideration of this petition. The decision below will have an impact on the NLRB. NLRB Chairman Dotson has already referred to the NLRB's "heavy workload" and expressed displeasure with the involvement of the NLRB in delinquency collection. *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting).

payments to any representative of its employees, Section 302(c)(5) allows an employer to contribute to a trust fund that satisfies certain statutory requirements, including, *inter alia*, that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. §186(c)(5)(B). This requirement is a restriction on possible abuse in the administration of the fund. *See NLRB v. Amax Coal Company*, 453 U.S. 322 (1981).

Prior to 1974, district court jurisdiction of suits for delinquent contributions was predicated exclusively on Section 301 of the LMRA, 29 U.S.C. §185. *See, e.g., Lewis v. Benedict Coal Corporation*, 361 U.S. 459 (1960). For years, the Trust Funds operated within the context of the LMRA. All that changed profoundly when Congress enacted ERISA in 1974, and later the MPPAA in 1980, which amended ERISA.[3]

The MPPAA amendments to ERISA were prompted by Congressional concern that the financial health of multiemployer pension plans was in decline and that the maintenance and growth of such plans was being discouraged. *See* MPPAA §3, 29 U.S.C. §1001a. *See generally* H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980). Congress recognized that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans," and sought by

[3]ERISA is a "comprehensive and reticulated statute" designed to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), *quoting Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980); 29 U.S.C. §1001(a). Finding that the private employee benefit plan system is "affected with a national public interest" in providing for the "well-being and security of millions of employees and their dependants," 29 U.S.C. §1001(a), Congress established the regulation of private employee benefit plans as exclusively a federal concern. *Alessi*, 451 U.S. at 523. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA sets reporting and disclosure requirements, imposes minimum standards for employee participation, vesting, benefit accrual, plan funding, and plan fiduciary conduct, provides for civil and criminal enforcement of its provisions, and creates a termination insurance program to protect plan participants against loss of specified benefits upon plan termination. *See Shaw*, 463 U.S. at 91; *Nachman*, 446 U.S. at 361 n.1; *Alessi*, 451 U.S. at 510 n.5. Congress declared that the policy of ERISA is to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1001(b).

directly affected by multiemployer pension plans," and sought by enacting MPPAA to enhance the financial stability of such plans and to foster their maintenance and growth. 29 U.S.C. § 1001a. *See also Amax Coal*, 453 U.S. at 338 n.22. Congress also recognized that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. Section 306(a) of MPPAA added Section 515 to ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The language of Section 515 of ERISA offers a clear indication of Congress' intent to require strict observance of the "*terms* of a collectively bargained agreement" where those terms provide that the "employer . . . is obligated to make contributions to a multiemployer plan" unless observing the terms of the agreement is "inconsistent with law." Section 306(b)(2) of MPPAA added Section 502(g)(2) to ERISA, 29 U.S.C. § 1132(g)(2), which provides for mandatory awards of interest, liquidated damages, and attorneys' fees to multiemployer plans when judgment is entered in their favor in an action to enforce Section 515 of ERISA.[4]

The paramount concern of Congress in enacting Sections 502(g)(2) and 515 of ERISA was to promote the prompt payment of contributions and to assist multiemployer plans in recovering both

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[4]Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), affords a basis for district court jurisdiction over violations of Section 515. 779 F.2d at 501 n.7; *Laborers Health and Welfare Trust Fund v. Hess*, 594 F.Supp. 273, 278 (N.D. Cal. 1984). Section 502(a)(3) provides:

> A civil action may be brought— . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

Section 515 of ERISA, 29 U.S.C. § 1145, is a "provision of this subchapter" within the meaning of Section 502(a)(3) of ERISA.

delinquent contributions and the costs incurred in connection with such delinquencies in order to lessen the serious financial impact of delinquencies on multiemployer plans:

> *Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans.* Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.
>
> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection . . . A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent

> of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43–44 (Comm. Print 1980) (emphasis added). The Senate Labor Committee's explanation of the overall purpose of Sections 502(g)(2) and 515 was later reaffirmed by the legislation's sponsors, Representative Thompson and Senator Williams. *See* 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982); *Central Transport*, 86 L.Ed.2d at 464 n.22.

In addition to addressing the problem of delinquent contributions, the MPPAA, *inter alia*, added to ERISA provisions for the assessment of withdrawal liability[5] on employers which completely or partially terminate their participation in multiemployer defined benefit pension plans under certain circumstances. MPPAA § 104(2), 29 U.S.C. §§ 1381–1405. Congress expressly provided in the MPPAA that the NLRB is *not* the exclusive forum for determining whether or not an employer has a post-contract expiration obligation under the NLRA to continue making contributions to a

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[5]According to the Court in *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 725 (1984):

> As enacted, the [MPPAA] requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391.

Like the collection of delinquent contributions, the collection of withdrawal liability from employers was considered by Congress to be "central to this legislation." 126 Cong. Rec. 20180 (1980). *See id.* at 23039. Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations . . ." MPPAA § 3(a)(4)(A), 29 U.S.C. § 1001a(a)(4)(A). *See generally* H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980).

multiemployer pension plan. An employer which permanently ceases to have an "obligation to contribute" may be assessed withdrawal liability. ERISA § 4203, as added by MPPAA § 104(2), 29 U.S.C. § 1383.[6] The definition of "obligation to contribute" includes a duty imposed by the NLRA.[7] As a result, in determining whether an employer has withdrawn from a multiemployer pension plan and has withdrawal liability, one must decide whether or not the employer continues to be obligated under the NLRA to contribute. Who makes this decision under the MPPAA? Not the NLRB. The trustees of the plan make this decision in the first instance (ERISA § 4219, as added by MPPAA § 104(2), 29 U.S.C. § 1399), then, if necessary, an arbitrator (ERISA § 4221(a), as added by MPPAA § 104(2), 29 U.S.C. § 1401(a)), and ultimately, if necessary, a federal district court (ERISA § 4221(b), as added by MPPAA § 104(2), 29 U.S.C. § 1401(b); ERISA § 4301, as added by MPPAA § 104(2), 29 U.S.C. § 1451). To the extent that the Court may want to avoid stepping over the line into the NLRB's jurisdiction, Congress has, in the MPPAA amendments to ERISA, obliterated the line. The withdrawal liability provisions of MPPAA have already encroached upon the NLRB's jurisdiction, and there is no practical sense in making a distinction in this regard between suits to collect delinquent contributions and to collect delinquent withdrawal liability payments. Since the federal district courts must decide in the context of withdrawal liability litigation when the contribution obligation imposed by the NLRA ceases, it should be no great imposition on federal labor policy for the courts to decide the same issue in the context of contribution delinquency litigation under Section

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[6]Under ERISA, as amended by the MPPAA, "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal . . . then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability." ERISA § 4201(a), as added by MPPAA § 104(2), 29 U.S.C. § 1381(a). "The term 'complete withdrawal' means a complete withdrawal described in section 1383 of this title." ERISA § 4201(b)(2), as added by MPPAA § 104(2), 29 U.S.C. § 1381(b)(2). "[A] complete withdrawal from a multiemployer plan occurs when an employer—(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." ERISA § 4203(a), as added by MPPAA § 104(2), 29 U.S.C. § 1383(a).

[7]The term "obligation to contribute" is defined as "an obligation to contribute arising . . . (1) under one or more collective bargaining (or related) agreements, *or (2) as a result of a duty under applicable labor-management relations law*." ERISA § 4212(a), as added by MPPAA § 104(2), 29 U.S.C. § 1392(a) (emphasis added).

515. That Congress so intended is evinced by the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. ERISA §4221(d), as added by MPPAA §104(2), 29 U.S.C. §1401(d); ERISA §4301(b), as added by MPPAA §104(2), 29 U.S.C. §1451(b).

The Trust Funds have advanced the position set forth in *Laborers Health and Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984), that the phrase "obligated to make contributions" which appears in Section 515 includes an obligation to contribute arising as a result of Section 8(a)(5) of the NLRA, as amended, 29 U.S.C. §158(a)(5). This position is based on the definition of "obligation to contribute" in 29 U.S.C. §1392(a)(2). As the court explained in *Hess*, 594 F. Supp. at 279 n.6, the definition of "obligation to contribute" in 29 U.S.C. §1392(a) should be read into Section 515:

> "It is true that the definition of obligation to contribute in section 1392 states that the definition is '[f]or purposes of this part,' evidently referring to Part 1—'Employer Withdrawals,' which is only one of three parts of Subtitle E, 'Special Provisions for Multiemployer Plans . . . .'" *Schulze*, 564 F. Supp. at 1294 n.4. "No other definition of obligation to contribute is found anywhere in ERISA, however. There is no reason to believe that Congress intended to create any discontinuity between the employer withdrawal part of the Act and the other contexts in which the question of obligation to contribute might arise." *Id*. Thus, it makes sense to apply the definition of section 1392 when interpreting the phrase "obligated to make contributions" in section 515.

Statements in the Congressional Record by the legislation's sponsors support the position of the Trust Funds and *Hess* in this regard. Both sponsors of the legislation stated that "[t]he bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson); *id*. at 23288 (statement of Sen. Williams).

Contrary to *Hess* and the position of the Trust Funds, the Ninth Circuit concluded that the obligation to pay the contributions

required by Section 515 of ERISA must arise under an extant agreement (as opposed to a statute such as Section 8(a)(5) of the NLRA) in order to create district court jurisdiction. The only explanation that the Ninth Circuit gave for its refusal to adopt the definition of "obligation to contribute" contained in the withdrawal liability provisions of ERISA was the conclusory statement that "a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than employer's general liability for ERISA violations." 779 F.2d at 502. The Ninth Circuit offered no reason why Congress would want to create a discontinuity between the withdrawal liability part of ERISA and the other contexts in which the question of obligation to contribute might arise. *See I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp. 1285, 1294 n.4 (N.D. Cal. 1983); *Hess*, 594 F. Supp. at 279 n.7. That Congress intended such a discontinuity is implausible since the date of withdrawal and the cessation of an employer's obligation to make contributions are conceptually and statutorily intertwined. *Schulze*, 564 F. Supp. at 1289.

The Ninth Circuit's recent decision in *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986), provides a clear example of the interconnection between the date of withdrawal and the cessation of the post-contract expiration obligation to make contributions. In *Woodward*, a multiemployer pension fund sought to collect withdrawal liability. The existence of withdrawal liability turned on whether or not the employer (Woodward) had an obligation to contribute under the plan on or after September 26, 1980 (the effective date of the withdrawal liability provisions) as a result of a duty under applicable labor-management relations law.[8] Relying on *Producers Dairy*, 654 F.2d at 627, the Ninth Circuit noted that Woodward was required to make pension fund contributions until negotiations reached an impasse. The Ninth Circuit determined that the critical issue in *Woodward* was whether or not an impasse had been reached, and instructed the district court to decide on remand whether or not an impasse in negotiations had been reached between the two parties and, if so, whether that impasse was reached before or after

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[8]The collective bargaining agreement between Woodward and the union had expired on August 15, 1980.

September 26, 1980. These same issues concerning the existence and timing of an impasse in negotiations would be presented in an action under Section 515 of ERISA to collect post-contract expiration delinquent contributions.

The result in *Woodward* is consistent with the district court's decision to resolve the impasse issue in *Schulze*. In *Schulze*, the trust fund brought an action against the employer to collect both unpaid contributions and withdrawal liability. 564 F.Supp. at 1287. The employer in *Schulze* made contributions to the trust fund after the expiration of the collective bargaining agreement, and then ceased payments. *Id*. at 1288. The *Schulze* court decided that the statutory phrase "obligation to contribute arising . . . as a result of a duty under applicable labor-management relations law" (29 U.S.C. §1392(a)(2)) incorporates the impasse concept developed under the NLRA. *Id*. at 1296. It concluded that the date that an employer's obligation to contribute to the plan ceased is the same for purposes of determining both liability for contributions and an employer's withdrawal date. *Id*. at 1294 n.4. With respect to the facts before it, the court concluded that "if Schulze reached impasse in its negotiations with the IAM and took definite steps to implement its prior position that it would no longer participate in the Plan, then at that point it permanently ceased to have an obligation to contribute to the Plan and, therefore, withdrew." *Id*. at 1296. The *Schulze* court found that an impasse had been reached by the time Schulze ceased making contributions to the plan. *Id*. at 1297-98. Because the impasse relieved Schulze of any outstanding obligation to contribute to the trust fund, the district court rejected the trust fund's claim for delinquent contributions.

In the opinion below, the Ninth Circuit recognized that "[t]he district court's decision to resolve the impasse issue in *Schulze* is clearly at odds with our conclusion here that the primary jurisdiction of the NLRB preempts a §515 suit to recover unpaid contributions after a collective agreement has expired." 779 F.2d at 501 n.6. The decision below is also clearly at odds with the decision of the Ninth Circuit panel in *Woodward*, which instructed the district court to decide on remand the critical issue of whether or not an impasse had been reached. The existence of this intracircuit conflict is another factor weighing in favor of granting a writ of certiorari in the

instant case. *See*, *e.g.*, *John Hancock Mutual Life Insurance Company v. Bartels*, 308 U.S. 180, 181 (1939); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948).

The construction of Section 515 by the court below makes the jurisdictional scope of Section 515 no different from that of Section 301 of the LMRA with respect to the collection of delinquent contributions.[9] As a result, Section 515, as construed by the Ninth Circuit, adds nothing to Title 29 of the United States Code. This result is contrary to both the established rules of statutory construction and Congress' desire in enacting Section 515 to facilitate the collection of delinquent contributions in order to protect the financial integrity of the multiemployer employee benefit plans upon which so many working people rely.

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . [Footnotes omitted.]

Sutherland Statutory Construction §46.06 (4th ed.) at 104. "Where different words are used in different parts of a statute, they are presumed to have different meanings." *Id*. at 108 n.1. Section 515 contains language which is entirely different from that of Section 301. Nevertheless, the Ninth Circuit's reading of Section 515 has made the jurisdictional breadth of Section 515 and Section 301 exactly the same with respect to the collection of delinquent contributions. As a result, the decision below ignores the statutory construction maxim that the legislature does not enact superfluous, repetitive legislation.

The Ninth Circuit commits the same errors when it adopts the reasoning of the district court in *Mo-Kan Teamsters Pension Fund v.*

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[9] In *Cement Masons Health and Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), *aff'd for the reasons stated in the district court's opinion*, 692 F.2d 641 (9th Cir. 1982), the district court held that there was no jurisdiction under Section 301 of the LMRA over a suit to collect unpaid fringe benefit contributions owing to an employee benefit plan for the period after the expiration of the collective bargaining agreement.

Botsford Ready Mix Co., 605 F. Supp. 1441 (W.D. Mo. 1985): "[a]s *Botsford* properly observes, there is no reason to believe that Congress would use 'an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act.' 605 F. Supp. at 1445." 779 F.2d at 502. Also following *Botsford*, the Ninth Circuit pointed to what it claimed to be "the similarity between the phraseology in section 515 and that in section 1392(a)(1) ('obligation to contribute arising . . . under one or more collective bargaining . . . agreements')" in order to "reinforce the conclusion that Congress intended section 515 liability to be less extensive than withdrawal liability." *Id*. By adopting the *Botsford* approach, the Ninth Circuit failed to recognize, in stressing the similarity between the two sections, the *difference*: when Congress meant to say "under one or more collective bargaining agreements" and thereby limit the definition of "obligation to contribute" to obligations arising under an extant agreement, Congress knew perfectly well how to do so and did just that in 29 U.S.C. §1392(a)(1). Congress' use of the phrase "obligated to make contributions to a multiemployer plan *under the terms*" of a collective bargaining agreement in 29 U.S.C. §1145, which is different language from that found in 29 U.S.C. §1392(a)(1), establishes the Congressional intent to have two different meanings. Section 515 specifically requires an employer to make contributions where the employer is obligated to do so "under the terms of the plan or under the terms of a collectively bargained agreement," which includes the situation where the terms of the plan or agreement have been extended by operation of law (for example, Section 8(a)(5) of the NLRA).[10]

Finally, the opinion below fails to recognize the relationship between Section 302(c)(5) of the LMRA (requirement of a "detailed basis" for contributions "specified in a written agreement")[11] and

[10]As noted in the opinion below, the terms of an expired collective bargaining agreement define the parameters of the employer's obligation under Section 8(a)(5) of the NLRA, as amended, 29 U.S.C. §158(a)(5), to maintain the status quo until the duty to bargain ceases. 779 F.2d at 500. *See Producers Dairy*, 654 F.2d at 627.

[11]As discussed *supra*, Section 302(c)(5)'s requirement that the "detailed basis" for contributions be "specified in a written agreement" relates to the *terms* of the agreement and provides one of several safeguards with respect to the administration of the fund.

Section 515 in interpreting the language of the latter. The language of Section 515 ("obligated to make contributions . . . under the terms") reflects the language of Section 302(c)(5) of the LMRA ("the detailed basis" on which contributions are to be made must be "specified in a written agreement"). The operative words of Section 515 are "obligated to make contributions"; the reference to "under the terms of" the plan or the collective bargaining agreement merely echoes the restrictive language of Section 302(c)(5) of the LMRA in recognition of the need for a detailed and written set of rules governing the contributions in order to avoid abuse in the administration of the fund.

The Ninth Circuit's demarcation of the scope of Section 515 removes post-contract expiration collection actions from the enforcement scheme of ERISA, as amended by the MPPAA. Under the Ninth Circuit's reading of Section 515, multiemployer plans will be forced to litigate the same continuing delinquency in two separate forums; they will be required to file both an action in district court for fringe benefit contributions due through the expiration date of the collective bargaining agreement and a second, separate charge with the NLRB for fringe benefit contributions due after the expiration date of the agreement. Congress could not possibly have intended such a bifurcated procedure when it enacted the MPPAA amendments to ERISA. The MPPAA amendments, which added Sections 515 and 502(g)(2) to ERISA, reflect Congressional recognition of the importance of delinquency collection to the overall financial health of multiemployer plans. Removal of post-contract expiration collection actions from the enforcement scheme of ERISA, as amended by the MPPAA, would, therefore, be contrary to the Congressional policies embodied in the MPPAA amendments to ERISA.

Thus, the policies, language, legislative history and comprehensive statutory scheme of ERISA, as amended by the MPPAA, and the established rules of statutory construction all compel the conclusion that a district court has jursidiction pursuant to Sections 502 and 515 of ERISA over suits to collect fringe benefit contributions owing under expired collective bargaining agreements.

II. NLRB Proceedings Do Not Provide Trustees With Adequate Means to Fulfill Their Fiduciary Duties of Assuring the Financial Integrity of Multiemployer Employee Benefit Plans.

The Ninth Circuit's conclusion that Section 515 does not provide a basis for district court jurisdiction in the instant case is predicated on the Ninth Circuit's assumption that the NLRB will be an adequate avenue of redress for trust funds. 779 F.2d at 503–04 & n.13. The inaccuracy of this assumption becomes readily apparent upon a review of the differences between ordinary NLRB matters and trust fund delinquency collection actions. While the NLRB unfair labor practice procedures may be effective in resolving union and management labor relations disputes and in contributing to labor peace—the purposes for which the NLRB was created—such procedures will very likely hamstring the trustees in fulfilling their fiduciary duties of assuring the financial integrity of the plans for their beneficiaries by promptly collecting delinquent contributions. *See Central Transport*, 86 L.Ed.2d at 459–62, 464; *Amax Coal*, 453 U.S. at 334–37 ("The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by §302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure").

As discussed *supra*, ERISA, and especially the MPPAA amendments thereto, reflect Congressional concern for assuring the financial integrity of employee benefit plans and holding employers to the full and prompt fulfillment of their contribution obligations. *See, e.g., Central Transport*, 86 L.Ed.2d at 460. "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries . . . " *Id.* at 458. In *Central Transport*, the Court reiterated the "trustee responsibility for assuring full and prompt collection of contributions owed to the plan." *Id.* at 459.[12]

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[12]In *Central Transport*, 86 L.Ed.2d at 460, the Court noted:

> The Secretary of Labor has explicitly interpreted the trustees' duty to prevent employer use of trust assets as . . . requiring plans to adopt systems for policing employers . . . In the Department's view, plans "which do not establish and implement [such] collection procedures" may "by failing to collect delinquent contributions" be found to have violated §406's prohibition of extensions of credit to employers. Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976); *accord*, Department of Labor Advisory Op. No. 78-28A (Dec. 5, 1978) . . .

In defining the scope of the fiduciary duties of employee benefit plan trustees, the Third Circuit has held that the trustees are required "to take action against employers who fail to contribute to the fund as required by the plan." *Rosen v. Hotel and Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981). In *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), the Ninth Circuit recognized that "pension plan trustees have a fiduciary duty to maintain the financial security of the trust, [citation omitted] and that at some point failure to attempt to collect pension contributions may result in a breach of the trustee's statutory fiduciary duty of care and diligence in administering the plan." *See also* Sections 404(a)(1) and 405(c) of ERISA, 29 U.S.C. §§1104(a)(1) and 1105(c).

The Court rejected in *Central Transport* the argument that trust funds should rely on federal government agencies to police employer compliance as an alternative to direct action by the trust funds:

> There are also compelling reasons why the Department of Labor's power to police employer compliance must be rejected as an alternative to audits by the plans themselves. Indeed, *the structure of ERISA makes clear that Congress did not intend for government enforcement powers to lessen the responsibilities of plan fiduciaries.*
>
> First, the Department of Labor denies that it has the resources for policing the day-to-day operations of each multiemployer benefit plan in the Nation. The United States, as amicus, informs us that approximately 900,000 benefit plans file annual reports with the Secretary of Labor, and that between 11,000 and 12,000 of these are multiemployer plans. As the petitioners' situations illustrate, some multiemployer plans can be quite large. . . . It is therefore not surprising that the United States argues that "[i]t is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits . . . "
>
> Second, although ERISA grants the Secretary of Labor broad investigatory powers, *see*, *e.g.*, 29 U.S.C. §1134, neither the structure of the Act nor the legislative history show any congressional intent that plans should rely primarily on

> centralized federal monitoring of employer contribution requirements. Indeed, Congress expressly withheld from the Secretary the authority to initiate actions to enforce an employer's contribution obligations. *See* 29 U.S.C. §§1132(b)(2), 1145. In contrast, as we have noted, trustees were given the authority to sue to enforce an employer's obligations to a plan. §1132. [Emphasis added.]

Id. at 462-63.[13] It would be contrary to the rationale set forth in *Central Transport* for trust funds to be forced to rely on the NLRB to enforce employers' contribution obligations. *Central Transport* teaches that trustees cannot delegate their obligation to collect contributions. In addition, unfair labor practice proceedings before the NLRB will *not* provide protection to benefit plan participants and beneficiaries comparable to that afforded by federal court litigation under Section 515 of ERISA.

The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions. *First*, the NLRB declines to exercise jurisdiction over non-retail enterprises where the gross inflow or outflow of goods affecting interstate commerce is less than $50,000. *See Culligan Soft Water Service*, 149 N.L.R.B. 2 (1964).

Second, the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge with the NLRB. *See* §10(b) of the NLRA, 29 U.S.C. §160(b).[14] By contrast, a federal court action under ERISA to collect delinquent contributions is governed by the most applicable statute of limitations of the forum state since ERISA does not specify one. *See Miles v. New York State Teamsters Conference Pension and Retirement*

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[13]Section 306(b)(1) of MPPAA added Section 502(b)(2) to ERISA, 29 U.S.C. §1132(b)(2), which provides: "The Secretary shall not initiate an action to enforce section 1145 of this title."

[14]Denying district court jurisdiction to the Trust Funds will in all likelihood prejudice their claims against Advanced Lightweight. The Trust Funds have maintained throughout this litigation that no impasse was reached prior to June 15, 1983, when Advanced Lightweight stopped making contributions. Any NLRB charge by the Trust Funds at this time would in all likelihood be time-barred, and, if not time-barred, any remedy would be limited to the six-month period immediately preceding the filing of the charge.

Fund Employee Pension Benefit Plan, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In California, the statute of limitations for actions for breach of a statutory duty is three years. Cal. Civ. Proc. Code §338 (Deering 1986). Trust funds rely on the self-reporting of employers or on audits of the employer's payroll and personnel records to determine whether contributions are due. *Central Transport*, 86 L.Ed.2d at 453. A six-month limitation, while arguably appropriate where the union or employer will have first-hand knowledge of the actions constituting an unfair labor practice, would be a profound restriction on trust funds, which ordinarily do not have an ongoing, day-to-day working relationship with the employer.[15]

Third, the investigation, issuance of complaint, prosecution and enforcement with respect to the unfair labor practice is entirely within the control of the General Counsel of the NLRB. *See* 29 U.S.C. §153(d); 29 C.F.R. §§101.2, 101.4, 102 *et seq*. The trustees would have no control over the decision to issue the complaint, or the discovery, timing and tactical and strategic decisions involved. They would, in short, be at the mercy of the General Counsel who, unlike the trustees, has no fiduciary duties under ERISA and whose discretion in exercising its jurisdiction over unfair labor practices is subject to very few limitations. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"); *Baker v. International Alliance of Theatrical Stage Employees*, 691

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[15]Any notion that trustees can rely on unions to enforce an employer's obligations to an employee benefit plan did not survive the Court's decisions in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984), and *Central Transport*, where the Court concluded:

> [C]ompelling benefit plans to rely on unions would erode the protections ERISA assures to beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of beneficiaries, and unions' duties toward beneficiaries are of a quite different scope.

Central Transport, 86 L.Ed.2d at 461.

F.2d 1291, 1297 (9th Cir. 1982) ("nothing in it [the NLRA, as amended] requires the General Counsel to issue complaints upon the finding of a violation . . . his statutory authority is permissive."); *International Association of Machinists v. Lubbers*, 681 F.2d 598, 603 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) ("the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court"). Indeed, in a recent dissent, NLRB Chairman Dotson referred to the NLRB's "heavy workload" and criticized the use of unfair labor practice proceedings to collect delinquent fringe benefit contributions *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). *See, e.g., Can-Do, Inc.*, 279 N.L.R.B. No. 108 (1986) (Dotson, dissenting); *Can-Do, Inc.*, 279 N.L.R.B. No. 111 (1986) (Dotson, concurring in part and dissenting in part).[16]

Fourth, even should the trust funds prevail in an unfair labor practice proceeding before the NLRB, they will *not* receive the attorneys' fees and double interest on unpaid contributions that they would have been awarded by a district court if a judgment had been entered in their favor in an action to enforce Section 515 of ERISA. *See* 29 U.S.C. §1132(g)(2); *Lads Trucking Company v. Board of Trustees*, 777 F.2d 1371, 1373 (9th Cir. 1985); *Winterrowd v. David Freedman and Company, Inc.*, 724 F.2d 823, 827 (9th Cir. 1984). "The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940)." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. ___, 89 L.Ed.2d 223, 229 n.5 (1986). By contrast, the mandatory double interest provisions which the MPPAA added to ERISA, 29 U.S.C. §1132(g)(2)(B) and (C), "fulfill most of the usual functions of punitive damages in deterring misconduct and ensuring compliance." *Winterrowd*, 724 F.2d at 827. In addition, unlike the NLRB, a district court may, in certain

[16]In *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that neither the Board of Trustees of an employee benefit plan nor the individual Trustees had standing to bring an unfair labor practice charge against the employer.

circumstances, award punitive damages in actions to recover unpaid employer contributions under Section 515 of ERISA. *Id.* at 826-27.

Fifth, unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the charged party despite objections by the charging party. *See* 29 C.F.R. §101.9(c). *See, e.g., Botsford*, 605 F. Supp. at 1444. *Finally*, NLRB negotiated settlements may compromise contribution obligations in exchange for employer concessions in other areas. *Id.* (settlement in an amount equal to 80% of the contributions that should have been paid).

The foregoing makes clear that the NLRB is *not* an adequate avenue of redress for trust funds with respect to the collection of delinquent contributions. In situations where the NLRB, for whatever reason (including reasons unrelated to the merits of the claim), refuses to prosecute, multiemployer employee benefit plans will have *no available forum* in which to collect post-contract expiration contribution delinquencies under the Ninth Circuit's reading of Section 515.[17] Such a result is contrary to *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), where the Ninth Circuit noted: "[w]e are persuaded by both the structure and purpose of ERISA that Congress would not impose upon the Funds' trustees a fiduciary duty to maintain the fiscal integrity of the trusts without providing them a forum in which to do so."[18] And, even where the NLRB decides to prosecute, trust funds may very well *not* receive a settlement or NLRB order in an amount equal to 100% of the contributions that should have been paid. Even when relief before the NLRB is unavailable or inadequate, trust funds will remain liable for pension benefits for hours worked by employees for which no contributions were made.[19] *See Central*

[17]The court below noted that "[w]ere the trust funds absolutely barred, procedurally or otherwise, from any remedy against Advanced except at the instigation of the unions, an alternative result granting jurisdiction to the district court might be justified." 779 F.2d at 503 n.13.

[18]*Cf. Vaca*, 386 U.S. at 182-83 ("The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine").

[19]Trust funds will also remain liable for other fringe benefits when the applicable trust documents provide for benefits for hours worked by employees regardless of an employer's failure to make the required contributions.

States Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc., 472 F. Supp. 1243, 1247 (E.D. Mich. 1979) ("ERISA protects employees' rights to pension funds under pension trusts if the employees qualify. 29 U.S.C. §§ 1052, 1053 and 1054. Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether or not an employee qualifies"); *Central Transport*, 86 L.Ed.2d at 455 n.7, 463 n.20 ("the Labor Department has consistently taken the position that any pension plan document language denying benefits to a participant because of an employer's failure to make required contributions would violate ERISA and would thus be unenforceable . . . At a minimum, this means that [a trust fund] is reasonable in operating . . . under the assumption that it would be liable for pension claims regardless of an employer's failure to make required contributions"); *Central States, Southeast and Southwest Areas Pension Fund v. McNamara Motor Express, Inc.*, 503 F. Supp. 96 (W.D. Mich. 1980); 29 C.F.R. § 2530.200b-2.

Despite the express Congressional desire in enacting Section 515 to facilitate the collection of delinquent contributions as a way of securing the financial health of multiemployer employee benefit plans, multiemployer plans will, as a result of the decision below, be required to meet the financial burden of ERISA's guarantees in the form of pension payments without corresponding contributions to the plans. The Trust Funds respectfully submit that they must be afforded the opportunity to enforce post-contract expiration contribution obligations in the federal district courts of this nation. To hold otherwise will compromise the actuarial soundness of multiemployer plans and obstruct the trustees in their performance of the fiduciary obligations imposed on them by ERISA, as amended, and Section 302 of the LMRA.

III. The Decision Below That Actions Under Section 515 of ERISA to Collect Post-Contract Expiration Contribution Delinquencies Are Preempted by the NLRA Under *Garmon* Conflicts with Decisions of This Court.

The Ninth Circuit's literal and mechanical application of the *Garmon* preemption doctrine in the instant case conflicts with decisions

of this Court.[20] While the Court has not directly addressed the question presented for review in this petition, the Court has expressly refused to apply the *Garmon* preemption doctrine in cases involving federal statutes other than ERISA where the alleged conduct was an unfair labor practice within the jurisdiction of the NLRB. *See, e.g., Smith v. Evening News Association*, 371 U.S. 195 (1962) (Section 301 of the LMRA); *Vaca, supra* (Section 301 of the LMRA); *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (the federal antitrust laws). This Court recognized in *Connell* that:

> In most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. [citation of *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), and *Garmon*] But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. [citation of *Vaca* and *Smith v. Evening News*]

421 U.S. at 635 n.17. *See California State Council of Carpenters v. Associated General Contractors*, 648 F.2d 527, 532 n.6 (9th Cir. 1980), *rev'd in part on other grounds*, 459 U.S. 519 (1983); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 518–19 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). In *Connell*, the Court, in refusing to apply the *Garmon* preemption doctrine,

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[20]The Court has often stated that the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 188 (1978); *Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983). Since the Court initially set forth the *Garmon* doctrine in 1959, it has recognized numerous exceptions to NLRB preemption. For example, "[t]his pre-emption doctrine . . . has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca*, 386 U.S. at 179. *See Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977). The Court has also "refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' [Citations omitted.]" *Farmer*, 430 U.S. at 297. In addition, the Court has pointed out that "the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca*, 386 U.S. at 180. *Accord Farmer*, 430 U.S. at 300-01.

permitted an antitrust action under the Sherman Act to proceed with respect to an agreement that the Court found illegal under Section 8(e) of the NLRA, as amended, 29 U.S.C. §158(e), and reiterated its holding in other cases that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626 (footnote omitted). *See Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 85 (1982); *Pratt-Farnsworth*, 690 F.2d at 519 ("To the extent that collateral labor law issues arise in the course of an ERISA claim, the federal courts should be empowered to decide them").

The court below emphasized that, with respect to the failure to pay contributions after contract expiration, "[w]ithout a section 8(a)(5) violation, there is no section 515 infraction." 779 F.2d at 504. On that basis, the Ninth Circuit mechanically applied the *Garmon* preemption doctrine and incorrectly concluded that "[m]aking this underlying labor law determination is exclusively an NLRB matter." *Id.* Applicable decisions of this Court indicate that rigid application of the *Garmon* preemption doctrine is to be avoided, especially "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca*, 386 U.S. at 179. *See Farmer*, 430 U.S. at 302.[21]

It cannot fairly be inferred in the instant case that Congress intended exclusive jurisdiction to lie with the NLRB. *First*, the MPPAA was passed in 1980, well after the Court's decision in *Connell* in 1975 which recognized (based on its prior decisions in *Vaca* in 1967 and *Smith v. Evening News* in 1962) that, "where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies." *Connell*, 421 U.S. at 635 n.17. *Second*, nowhere does ERISA, as amended, require that any action under its provisions be taken before the NLRB.

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[21]The court below improperly suggested a different standard:

> We find no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse.

779 F.2d at 505.

Third, the *Garmon* preemption doctrine has not been applied to another federal statute, Section 303 of the LMRA, 29 U.S.C. §187, which incorporates some of the obligations embodied in the NLRA, as amended.[22] Allowing trust funds to seek judicial relief under Section 515 of ERISA in order to compel an employer's compliance with the contribution obligations imposed upon it by Section 8(a)(5) of the NLRA is analogous to litigation under Section 303 of the LMRA. Section 303 of the LMRA authorizes state and federal courts to award damages to any person injured by reason of any violation of Section 8(b)(4) of the NLRA, as amended, even though the underlying unfair labor practices are remediable by the NLRB. *See Teamsters v. Morton*, 377 U.S. 252, 258 (1964).[23] Thus, that Section 515 of ERISA incorporates some of the obligations embodied in the NLRA is not unique; Congress has previously enacted other legislation which does exactly that, namely, Section 303 of the LMRA. Without a Section 8(b)(4) violation, there is no Section 303 infraction. Nevertheless, making that underlying labor law determination is not exclusively an NLRB matter.

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[22]In addition to the judicially developed exceptions, Congress itself has created exceptions to the NLRB's exclusive jurisdiction in other classes of cases:

> Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, as amended, 29 U.S.C. §187, authorizes anyone injured in his business or property by activity violative of §8(b)(4) of the NLRA, 61 Stat. 140, as amended, 29 U.S.C. §158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. *See Teamsters v. Morton*, 377 U.S. 252 (1964). Section 301 of the LMRA, 29 U.S.C. §185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. *See Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Section 14(c)(2) of the NLRA, as added by Title VII, §701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. §164(c)(2), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Farmer, 430 U.S. at 297 n.8. *Accord Vaca*, 386 U.S. at 179–80.

[23]Section 8(b)(4) of the NLRA, as amended, 29 U.S.C. §158(b)(4), provides that certain conduct constitutes an unfair labor practice for which an administrative remedy before the NLRB is afforded.

Fourth, "this underlying labor law determination" (779 F.2d at 504), which the court below claims "is exclusively an NLRB matter" (*id.*) in the context of suits to collect delinquent contributions under Section 515 of ERISA, has been, and will continue to be, decided regularly by the federal courts under ERISA, as amended, in, for example, the context of suits to collect delinquent withdrawal liability payments. As discussed *supra*, when determining whether or not an employer has withdrawn and has withdrawal liability, the federal courts will have to determine whether or not the employer's obligation to contribute permanently ceased under "applicable labor-management relations law." 29 U.S.C. §1392(a)(2). As a result, in withdrawal liability litigation under ERISA, as amended, the federal courts must decide precisely the same issues regarding "impasse," refusal to bargain, and the date of cessation of the contribution obligation, which the federal courts would be called upon to decide in post-contract expiration contribution collection actions under Section 515. *See, e.g., Schulze, supra; Woodward, supra.* Consequently, the Ninth Circuit's assertion that these underlying labor law determinations are exclusively an NLRB matter simply makes no sense in the context of the MPPAA amendments to ERISA. The Trust Funds respectfully submit that the "intricate relationship" between withdrawal liability and post-contract expiration contribution obligations is an "intensely practical consideration[] which foreclose[s] pre-emption of judicial cognizance of" (*Vaca*, 386 U.S. at 183) post-contract expiration contribution collection actions under Section 515.[24]

Allowing trust funds to seek judicial relief under Section 515 to require an employer's compliance with the contribution obligations imposed upon it by the NLRA will not disserve the interests promoted by the federal labor statutes or interfere with the policy to be served by NLRB enforcement. Both avenues will lead to the desired result of compelling the employer to continue making contributions

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[24] *Cf. Vaca*, 386 U.S. at 183 ("There are some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract").

beyond the expiration date of the agreement until a new agreement is reached or the duty to bargain ceases. Since the federal courts must decide issues such as impasse and the date of cessation of the contribution obligation in the context of withdrawal liability litigation, it should be no great imposition on federal labor policy for the courts to decide these same issues in a contribution delinquency context. That Congress so intended is evinced by the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. 29 U.S.C. §§1401(d), 1451(b). As a result, recognition of an independent federal remedy under Section 515 for post-contract expiration contribution delinquencies is proper since said remedy is consistent with the NLRA, and this Court has permitted a choice of federal remedies in such cases.

ERISA, as amended, sets forth a clear Congressional policy of comprehensively dealing with all facets of fringe benefit contributions due from employers. It cannot be disputed that Section 515 of ERISA encompasses suits to collect delinquent contributions coming due before a collective bargaining agreement has expired. Similarly, withdrawal liability under ERISA, as amended, would normally arise only following impasse in negotiations, when the obligation to contribute imposed by Section 8(a)(5) of the NLRA finally ends. In both circumstances, ERISA, as amended, provides federal judicial remedies. 29 U.S.C. §§1132, 1401(b) and 1451(c). It simply makes no sense to conclude that Congress intended to create in the MPPAA amendments to ERISA a hiatus in federal judicial remedies between the date the contract expires and the date an impasse is reached in negotiations, or to carve out, *sub silentio*, an exception to federal judicial oversight in favor of the NLRB in a statutory framework envisioning a complete and coherent federal judicial approach to trust fund administration and enforcement.

CONCLUSION

For the reasons suggested above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1986

APPENDIX A

United States Court of Appeals

For The Ninth Circuit

Nos. 84-2403 to 84-2406

aborers Health and Welfare Trust und for Northern California, t al., Plaintiffs-Appellants, v. dvanced Lightweight Concrete o., Inc., Defendant-Appellee.	)
ement Masons Health and elfare Trust Fund for Northern alifornia, et al., Plaintiffs-Appellants, v. dvanced Lightweight Concrete ., Inc., Defendant-Appellee.	)

[Decided December 26, 1985]

OPINION

An Appeal
From the United States District Court
For the Northern District of California

Honorable Spencer J. Williams,
Judge Presiding
Argued and submitted October 8, 1985
Before: CHAMBERS, TANG, and PREGERSON
Circuit Judges.

PREGERSON, Circuit Judge:

In this case of first impression for an appellate court, we hold that the primary jurisdiction of the National Labor Relations Board preempts a trust fund's suit in district court under sections 502 and 515 of the Employee Retirement Income Security Act ("ERISA") to recover delinquent contributions accrued after a collective bargaining agreement has expired.

FACTS

As a member of the Associated General Contractors of California ("AGC"), Advanced Lightweight Concrete Co.

("Advanced") was a signatory both to the 1980-83 Laborers Master Labor Agreement and to the 1980-83 Cement Masons Master Labor Agreement ("master agreements"). These multi-employer collective bargaining agreements included a requirement that Advanced contribute on behalf of its employees to: the Laborers Health and Welfare Trust Fund for Northern California; the Laborers Pension Trust Fund for Northern California; the Laborers Vacations-Holiday-Dues Trust Fund for Northern California; and the Laborers Training and Retraining Trust Funds for Northern California; and to the Cement Masons' Health and Welfare Trust Fund for Northern California; the Cement Masons Pension Trust Fund for Northern California; the Cement Masons Vacation-Holiday-Supplemental Dues Trust Fund for Northern California; and the

Cement Masons Apprenticeship and Training Trust Fund for Northern California Fund ("trust funds"). The master agreements both incorporated the terms of the trusts by reference and specified the contributions due per employee hour worked from a signatory employer to the funds during the term of the agreement.

Before the expiration of the master agreements, Advanced withdrew AGC's authority to bargain on its behalf, and notified the Northern California District Council of Laborers of the Laborers International Union of North America AFL-CIO, the District Council of Plasterers and Cement Masons of Northern California, and the relevant local unions ("the unions") that it would not be bound by either the master agreements or any successor agreements beyond their June 15, 1983 expiration date. Advanced also

declared to the unions its readiness to negotiate independently.

While the parties disagree as to the nature of further contacts between Advanced and the unions[1/], it is not

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1/ Advanced's brief states: "Neither the Laborers' nor the Cement Masons' unions made any attempt to commence collective bargaining negotiations with the Company."
The Trust Funds' brief states: "Collective bargaining negotiations occurred between the Laborers Union and Advanced Lightweight after April 1, 1983."
On November 3, 1983, the Northern California District Council of Laborers filed an unfair labor practice charge against Advanced with the National Labor Relations Board ("NLRB") alleging a failure to bargain in good faith. No. 32-CA-6027. On November 28, 1983, the Regional Director refused to issue a complaint, noting the union's failure to provide any timely supporting documentary evidence. On December 30, 1983, the NLRB Office of Appeals denied the

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disputed that Advanced has not signed any collective agreement with either the Laborers' or Cement Masons' unions. There is also no dispute that Advanced has paid no contributions to either trust fund since June 15, 1983.

In December 1983, the trust funds filed separate suits against Advanced seeking unpaid contributions from June 15, 1983. In March and April 1984, the trust funds filed two further complaints demanding an audit of Advanced's books in accordance with the terms of the master

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union's appeal. The record shows that at least one meeting occurred between Advanced and Laborers' representatives on December 29, 1983.

agreements.2/ The former cases alleged jurisdiction based on ERISA § 502, 29 U.S.C. § 1132, and § 515, 29 U.S.C. § 1145, and Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185. In May 1984, the four cases were consolidated as related cases under local rules.

Relying entirely on Cement Masons Health and Welfare Trust Fund for Northern California v. Kirkwood-Bly, Inc., 520 F. Supp. 942 (N.D. Cal. 1981),

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2/ Both master agreements, in essentially similar terms, require a signatory employer to submit to an audit by the trust funds in order to enforce the contributions requirements in the agreements. Both funds wrote to Advanced seeking audits immediately following the filing of the first pair of suits. Advanced consented to audits only up to June 15, 1983 claiming that it was not bound by the audit provision beyond the expiration of the master agreements. No audits have ever been made.

aff'd for the reasons stated in the district court's opinion, 692 F.2d 641 (9th Cir. 1982), the district court held that it had no jurisdiction over the four related suits and granted summary judgment to Advanced. Trust funds timely appealed.

STANDARD OF REVIEW

A district court's determination that it is without subject matter jurisdiction is reviewed de novo. Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 549 (9th Cir. 1984). In reviewing a district court's grant of summary judgment, all inferences from the evidence are viewed in the light most favorable to the party against whom summary judgment was granted. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328-29 (9th Cir. 1983).

DISCUSSION

A.

Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 158(d). NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor

practice. Peerless Roofing Co. v. NLRB, 641 F.2d 734, 736 (9th Cir. 1981); Producer's Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund, 654 F.2d 625, 627 (9th Cir. 1981). However, after bargaining to impasse,[1]

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[1] "Impasse" is an imprecise term of art:

> The definition of an "impasse" is understandable enough--that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless--but its application can be difficult. Given the many factors commonly itemized by the Board and courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." The Board and courts look to such matters as the number of meetings between the company and the union, the length of those meetings and the period of time

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the employer may unilaterally implement the best offer made in negotiations. Katz, 369 U.S. at 745, 82 S.Ct. at 1112.

B.

In granting summary judgment, the district court relied on Cement Masons Health and Welfare Trust Fund for Northern California v. Kirkwood-Bly, Inc., 520 F. Supp. 942 (N.D. Cal. 1981), aff'd for the reasons stated in the

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[1] [continued from previous page]

> that has transpired between the start of negotiations and their breaking off. There is no magic number of meetings, hours or weeks which will reliably determine when an impasse has occurred.

R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining 448 (1976)(citation omitted). See also H & D Inc. v. NLRB, 665 F.2d 257, 259-60 (9th Cir. 1980), rev'd on other grounds, 455 U.S. 902, 102 S.Ct. 1243, 71 L.Ed.2d 440 (1982).

district court's opinion, 692 F.2d 641 (9th Cir. 1982). In Kirkwood-Bly, a trust fund sued under section 301 of the LMRA to recover contributions due after a collective agreement had expired but before impasse. 520 F. Supp. at 943. The district court reasoned that a collective bargaining agreement does not "survive" in the sense that it continues as a legally operative document; rather, the agreement's terms "survive" in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations. 520 F. Supp. at 943-45. Thus, the NLRB's primary jurisdiction preempts a suit to enforce the terms of

an expired collective agreement.[4/]

The trust funds dispute the validity of Kirkwood-Bly to their suits. Kirkwood-Bly expressly does not decide

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4/ "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.'" Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83, 102 S.Ct. 851, 859, 70 L.Ed.2d 833 (1982)(quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)(citing Garner v. Teamsters, 346 U.S. 485, 490-91, 74 S.Ct. 161, 165-66, 98 L.Ed. 228 (1953)).)

A panel of this court summarily affirmed in Kirkwood-Bly, 692 F.2d 741 (9th Cir. 1982), and later reaffirmed the Kirkwood-Bly reasoning in the context of subsequent Supreme Court decisions. George Day Construction Co. v. United Brotherhood of Carpenters and Joiners, 722 F.2d 1471, 1481 (9th Cir. 1984).

any similar trust fund suit brought under section 515 of ERISA. 520 F. Supp. at 946 n.2[1] Moreover, in an opinion decided after the district court's grant of summary judgment to Advanced, Chief Judge Peckham, who wrote the district court opinion in Kirkwood-Bly, held that the NLRA does not preempt a section 515 suit to recover delinquent contributions due after the expiration of a collective bargaining agreement. Laborers Health and Welfare Trust Fund v. Hess, 594 F.

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[1] "Plaintiffs do not argue that defendants have violated section 515 of ERISA, 29 U.S.C. § 1145...In fact, plaintiffs do not allege any ERISA violation or that ERISA can provide an alternate basis for jurisdiction." 510 F. Supp. at 946 n.2.

Supp. 273, 282 (N.D. Cal. 1984).[1] Kirkwood-Bly thus is not necessarily

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[1] Hess was subsequently dismissed by stipulation of the parties.

In the district court, the trust funds relied on I.A.M. National Pension Fund v. Schulze Tool and Die Co., 564 F. Supp. at 1285 (N.D. Cal. 1983). In Schulze, the employer made fund contributions after the expiration of the collective agreement, and then ceased payments. 564 F. Supp. at 1288. The court rejected the trust fund's § 515 claim for delinquent contributions finding that impasse had been reached, thus relieving Schulze of any outstanding obligation to the fund. Id. at 1297-98. In Hess, Judge Peckham refused to regard Schulze as determinative authority: "By assessing the merits of the claim for unpaid contributions, the court implicitly held that it had jurisdiction over the claim. But the court did not explicitly discuss the question of jurisdiction in its opinion." 594 F. Supp. at 279. The district court's decision to resolve the impasse issue in Schulze is

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determinative of the trust funds' suits insofar as they are based on section 515 of ERISA. However, Kirkwood-Bly does, as both parties concede, mandate affirmance of summary judgment on the trust funds' section 301-based causes of action.

C.

Section 515 of ERISA, 29 U.S.C. section 1145, states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

4/ [continued from previous page]

clearly at odds with our conclusion here that the primary jurisdiction of the NLRB preempts a § 515 suit to recover unpaid contributions after a collective agreement has expired.

Section 515 was added to ERISA in 1980 by section 306(a) of the Multiemployer Pension Plan Amendment Act ("MPPAA")[1/] to allow trust funds to recover

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1/ Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C. § 1132 et seq.

Section 515, in common with other ERISA provisions, is enforced via § 502(a)(3) of ERISA, 29 U.S.C. § 1132 (a)(3):

> A civil action may be brought--
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> ....
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

delinquent contributions from employers as expeditiously as possible.[8/]

8/ Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law--other than 29 U.S.C. § 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises...[T]his legislation is intended to clarify the law...by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23039 (1980)(statement

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In Hess, the court's conclusion that the NLRA does not preempt a section 515 suit after the collective agreement has expired relied heavily on statutory analysis. Based on this analysis, the court characterized the purpose of section 515 as remedial. Three other reported decisions have dealt explicitly with this issue subsequent to Hess, and all reach the opposite conclusion. Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co., 605 F. Supp. 1441, 1444-48 (W.D. Mo. 1985); U.A. 198 Health and Welfare Education and Pensions Funds v.

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of Rep. Thompson); id. at 23288 (statement of Sen. Williams). See also Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86-88, 102 S.Ct. 851, 861-62, 70 L.Ed.2d 833 (1982); id. at 91-97, 102 S.Ct. at 864-66 (Brennan J. dissenting).

Rester Refrigeration Service, Inc., 612 F. Supp. 1033, 1036-38 (M.D. La. 1985); Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc., 615 F. Supp. 792, 798-800 (N.D. Ill. 1985).[2]

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[2] The trust fund in Botsford has not appealed the dismissal of its suit. Both Rester and Badger adopt the Botsford reasoning over Hess without themselves reviewing the issues in detail. In Badger, the court found an alternative ground for jurisdiction under ERISA § 502. Badger 615 F. Supp. at 800-02. The employer had signed, as a term of the expired collective agreement, a supplemental agreement with the trust fund committing itself to contribute to the funds "until written notice revoking this Agreement is given to the Trust." Id. at 796-97. Badger's failure to revoke this supplemental agreement until many months after the collective agreement had expired made it liable to the trust fund for delinquent contributions between expiration and revocation. Id. at 801-02. There is no evidence in the record

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Hess rests on three premises. First, a phrase similar to "obligated to make contributions," which appears in section 515, is defined elsewhere in ERISA as "an obligation to contribute arising...(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a). Subpart (2) of this definition would seem to include obligations created by section 8(a)(5). Since no other relevant definition appears in ERISA, Hess concludes that

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of any supplemental agreement between Advanced and the trust funds. The actual trust agreements are not part of this record, but they must also be assumed not to provide the trust funds with any basis of recovery other than § 515.

the phrase used in section 515 has a similarly broad scope. 594 F. Supp. at 279. Yet, as Botsford points out, the section 1392(a) definition expressly refers only to withdrawal liability.[12/] 605 F. Supp. at 1445. Hence, a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than

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12/ Section 1392(a) begins: "For purposes of this part, the term 'obligation to contribute' means...." This clearly refers to Part I ("Employer Withdrawals") of Subtitle E ("Special Provisions for Multiemployer Plans") within Subchapter III ("Plan Termination Insurance") of ERISA. Section 515 is in Part 5 ("Administration and Enforcement") of Subtitle B ("Regulatory Provisions") within Subchapter I ("Protection of Employee Benefit Rights.") As the court noted in Hess: "Withdrawal liability is something quite different from regular fringe benefit contributions." 594 F. Supp. at 279 n.6.

employer's general liability for ERISA violations.

Second, Hess observes that section 515 applies to employers who are "obligated to make contributions...under the terms of a collectively bargained agreement", 594 F. Supp. at 279 (emphasis in original), and concludes that this specificity of phrase--and the absence of any other less precise phrase--suggests that section 8(a)(5) obligations were intended to fall within section 515. Id. We believe this conclusion to be incorrect. More persuasive is the similarity between the phraseology in section 515 and that in section 1392(a)(1)("obligation to contribute arising...under one or more collective bargaining...agreements"), which would reinforce the conclusion that Congress intended section 515 liability to be less

extensive than withdrawal liability. As Botsford properly observes, there is no reason to believe that Congress would use "an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act." 605 F. Supp. at 1445.

Third, Hess notes that the Congressional sponsors' statements indicate that the purpose of section 515 was to limit drastically the defenses available to employers in delinquent contribution suits. 594 F. Supp. at 280-81.[11] Since the disapproved

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[11] See 126 Cong. Rec. 23039 (statement of Rep. Thompson); id. at 23288 (statement of Sen. Williams) & n.10 supra. The Supreme Court has reached a similar conclusion: Kaiser Steel

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defenses could be asserted equally after an agreement has expired as before, Hess concludes that "it would make little sense to limit section 515 to actions involving obligations based on extant collective bargaining agreements." 594 F. Supp. at 281. Again the reasoning is unconvincing. No indication exists that, during its deliberations on the MPPAA, Congress even considered the problem of continuing obligations from expired agreements much less than it had a view on resolving any conflict between section

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[11] [continued from previous page]

Corp v. Mullins, 455 U.S. 72, 88, 102 S.Ct. 851, 862, 70 L.Ed.2d 833 (1982). See also Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1265-66 (9th Cir. 1984).

515 and the primary jurisdiction of the NLRB.[12/]

12/ Advanced refers to a staff report to the responsible Senate Committee which states that § 515's purpose was to avoid "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Committee on Labor and Human Resources, 96 Cong., 2d Sess. 44 (Comm. Print 1980). Advanced asserts that this demonstrates Congressional intent to limit § 515 to pure contractual obligations, not obligations continued by the mandates of other statutes. A contrary interpretation of Congressional intent might be gleaned from a statement of both sponsors of the bill: "The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong. Rec. 23039 (statement of Rep. Thompson); id. at 23288 (statement of Sen. Williams). This statement may suggest that the source of the employer's obligation is irrelevant to his duty to contribute.

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D.

Denying district court jurisdiction to the trust funds need not prejudice their claims against Advanced. There is no bar to the trust funds' filing an unfair labor practice charge against Advanced. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9 ("A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."); see Local Union

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Both analyses are plausible, especially when the highlighted phrases are examined out of context. In truth, no conclusion concerning Congressional intent over the availability of § 515 in a situation such as this could be proper gi en the absence of any indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA.

No. 25 International Brotherhood of Teamsters v. New York, New Haven and Hartfod Co., 350 U.S. 155, 160 76 S.Ct. 227, 230, 100 L.Ed. 166 (1956)(railroad may file unfair labor practice charge); Plumbers and Steamfitters Local 298 v. County of Door, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846 3 L.Ed.2d 872 (1959) (county may file charge); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 515-17 n.11 (5th Cir. 1982) cert. denied, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983)("[A]ny person, even a stranger to the collective bargaining agreement can bring unfair labor practice charges").[11/] The

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11/ The assertion in Botsford that a trust fund has no standing to file § 8(a)(5) charges is therefore wrong. 605 F. Supp. at

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dismissal of the union's charge against Advanced, see note 1 supra, does not

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1447. Were the trust funds absolutely barred, procedurally or otherwise, from any remedy against Advanced except at the instigation of the unions, an alternative result granting jurisdiction to the district court might be justified. This circuit has permitted a trust fund to proceed to trial on the merits in an ERISA enforcement action duplicating NLRA matters "where the injured party bringing the suit has no acceptable means to invoke the Board's jurisdiction and cannot induce its adversary to do so." Laborers Health and Welfare Trust Fund v. Kaufman & Broad, 707 F.2d 412, 415-16 (9th Cir. 1983). See also Operating Engineers Pension Trust v. Beck Engineering and Surveying Co., 746 F.2d 557, 565 (9th Cir. 1984)(extending Kaufman to defenses which cannot be presented to the Board); Sears, Roebuck & Co v. San Diego County District Council of Carpenters, 436 U.S. 180, 201-02, 98 S.Ct. 1745, 1759-60, 56 L.Ed.2d 209 (1978)(state court not necessarily

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prevent the trust funds filing a separate charge: the union's charge does not refer

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preempted if no other forum available).

The availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries caused by the dismissal of the § 515 suit. See Rosen v. Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592, 600 (3d Cir. 1981), cert. denied, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982); Kaufman, 707 F.2d at 416. Similarly, the trust funds' ability to prosecute their claim in an alternative form makes it unnecessary to consider the applicability here of the distinctions between the rights of trustees of a fund benefiting from a collective agreement and the rights of a unin under the same agreement noted in Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433, 439-41 (8th Cir. 1983)(en banc), aff'd sub nom. Schneider Moving and Storage Co. v. Robbins, 466 U.S. 364, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

to a failure to pay trust fund contributions and in denying the complaint, the NLRB stated: "This office will fully investigate any future charge in this matter...subject to the six month limitation period under Section 10(b) of the Act."14/

E.

The lack of useful statutory or Congressional guidance on section 515 requires that the matter be decided by the application of accepted labor law principles. When presented with a

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14/ At oral argument, counsel for the trust funds claimed that any NLRB charge by the funds against Advanced would be time-barred. If the funds' assertion that no impasse has yet been reached between Advanced and the unions is correct, Advanced's violation of § 8(a)(5) would be continuing, and thus a charge by the funds would be timely.

dispute that involves adjudicating conduct which "is arguably within the compass of § 7 or § 8 of the NLRA," a federal court must defer to the primary jurisdiction of the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). "The desire to protect the primary jurisdiction of the NLRB flows from the need to maintain centralized administration of the NLRA by a specialized agency. Labor law involves many difficult questions of policy best left to the agency that has the expertise needed to solve them. Thus, the courts have traditionally shown great deference to the NLRB." Burke v. French Equipment Rental, Inc., 687 F.2d 307, 311 (9th Cir. 1982). See also Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors, 689 F.2d 1339, 1342 (9th

Cir. 1982)(Congress intended matters of national labor policy to be decided first by NLRB).

In Kirkwood-Bly, the Ninth Circuit concluded that an employer's duty to pay trust fund contributions after a collective agreement has expired derives entirely from section 8(a)(5) and that a section 301 suit to recover unpaid contributions between expiration and impasse was preempted. 692 F.2d 641 (9th Cir. 1982), affirming, 520 F. Supp. at 944-45. The Kirkwood-Bly logic is equally persuasive in an ERISA-based suit. As with the employer in Kirkwood-Bly, Advanced's failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice. While admittedly the failure to pay may also violate section 515 of ERISA,

adjudication of the merits depends entirely on the section 8(a)(5) determination. Without a section 8(a)(5) violation, there is no section 515 infraction. Making this underlying labor law determination is exclusively an NLRB matter.11/

11/ See Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, 772 F.2d 530, 533 (9th Cir. 1985)(defendants' defense that union shop clause did not require union membership preempted by NLRB's primary jurisdiction); Arizona Laborers, Teamsters and Cement Masons Local 495 Health and Welfare Trust Fund v. Conquer Cartage Co., 753 F.2d 1512, 1515-17 & n.7 (9th Cir. 1985)(trust fund's defense, that the employer's failure to give the requisite 60 days notice of termination under NLRA § 8(d)(1) prevented the employer from claiming the expiration of the collective bargaining agreement, was preempted: "Because this argument is based entirely on the allegation that the employer

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We find no persuasive evidence in either the plain words or legislative

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11/ [continued from previous page]

committed an unfair labor practice under the NLRA, we lack jurisdiction to address its merits." Id. at 1516).

Advanced asserts that impasse was reached, or, if not, that the unions waived their bargaining rights, thus permitting Advanced to make unilateral changes in working conditions, but admits that the NLRB has never accepted this argument. Advanced suggests that since the duty to bargain in good faith created by § 8(d) of the NLRA is mutual, a union that breaches this duty should not be permitted to complain about the employer's unilateral changes in working conditions. Determining the merits of this argument is initially a matter of the NLRB. We, however, note that Advanced concededly made no payments after the day of expiration of the collective agreement. Since Advanced apparently breached §§ 8(d) and 8(a)(5) before the unions can possibly have waived their rights, it seems unlikely that Advanced could

[continued on next page]

history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse. Therefore, the district court's grant of summary judgment to Advanced must be affirmed.

15/ [continued from previous page]

successfully defend a properly documented fair labor practice charge. See Katz, 369 U.S. at 741-42, 82 S.Ct. at 1110-11.

APPENDIX B

FILED
July 30, 1984

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
OF CALIFORNIA

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,	)	No. C 83-6038-SW and related cases
Plaintiffs,	)	C 83-6039-SW
v.	)	C 84-1467-SW
	)	C 84-1802-SW
ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment in the above-captioned related cases is hereby GRANTED.

July 30, 1984

/s/ Spencer Williams
UNITED STATES DISTRICT COURT

[Entered on July 31, 1984]

APPENDIX C

FILED
March 18, 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,	)	Nos.
	)	84-2403,
	)	84-2404,
Plaintiffs-Appellants,	)	84-2405,
	)	84-2406
v.	)	
	)	ORDER
ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,	)	
	)	
Defendant-Appellee.	)	

Before: CHAMBERS, TANG, and PREGERSON, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing. Judges Tang and Pregerson voted to reject the suggestion for rehearing en banc and Judge Chambers recommends such rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

The motion for leave to file an amicus brief is denied as moot.

APPENDIX D

STATUTES INVOLVED

A. National Labor Relations Act, As Amended

Section 7 of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in relevant part:

> (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

....

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular

work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:
Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:
Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State of Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of

a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence,the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber

or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception...

B. Labor Management Relations Act of 1947, As Amended

Section 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302 of the LMRA, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged

in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities...

Section 303 of the LMRA, 29 U.S.C. § 187, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

C. Employee Retirement Income Security Act of 1974, As Amended

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA" 29 U.S.C. § 1132(a)(3), provides:

A civil action may be brought...

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(b)(2) of ERISA, as added by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), 29 U.S.C. § 1132(b)(2), provides:

> The Secretary shall not intitiate an action to enforce section 1145 of this title.

Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Section 502(g)(2) of ERISA, as added by Section 306(b)(2) of the MPPAA, 29 U.S.C. § 1132(g)(2), provides:

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 515 of ERISA, as added by Section 306(a) of the MPPAA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4201(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1381(a), provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1383, provides in relevant part:

> (a) For purposes of this part, a complete withdrawal from a

multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if--

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan--
(i) primarily covers employees in the building and construction industry, or
(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if--

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer--
(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

....

(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

Section 4212(a) of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C.

§ 1392(a), provides:

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or
(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4221 of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C.

§ 1401, provides in relevant part:

(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the

issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

....

(d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

Section 4301 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1451, provides in relevant part:

(b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment

within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdction over an action brought by a plan fiduciary to collect withdrawal liability.

D. Multiemployer Pension Plan Amendments Act of 1980

Section 3 of the MPPAA, 29 U.S.C. § 1001a, provides:

(a) The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will

enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of the Act--

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

The other pertinent portions of the MPPAA added sections to ERISA and are reproduced supra with the appropriate section of ERISA.